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RES JUDICATA AND CONSPIRACY CASES UNDER THE SHERMAN ACT

By FORREST REVERE BLACK*

In the history of litigation under the Sherman Act, there are many instances¹ wherein the government has secured a judgment or decree against the defendants in one jurisdiction and later instituted another suit involving the same (or closely related) issues and utilizing the same basic evidence against the same defendants in another jurisdiction, and yet strange to

¹ 1. *United States v. Standard Oil Co. of New Jersey, et al.*, 152 Fed. 290, 173 Fed. 177, 221 U. S. 1; *United States v. Standard Oil Co. (Indiana), et al.* 33 F. (2d) 617, 283 U. S. 163; 2. *United States v. Corn Products Refining Co., et al.*, 234 Fed. 964; *United States v. Corn Derivatives Institute, et al.* (N. D. Ill., Eq. No. 11634, consent decree filed April 6, 1932); 3. *United States v. Trans-Missouri Freight Assn., et al.*, 53 Fed. 440, 58 Fed. 58, 166 U. S. 290; *United States v. Missouri Pacific Railway Co., et al.* (E. D. Mo. Eq. No. 5839; Decrees and Judgments in Antitrust Cases, p. 243; 20 I. C. C. 307); 4. *United States v. Swift & Co., et al.*, 122 Fed. 529; *Swift and Company v. United States*, 196 U. S. 375; *Swift & Co., et al. v. United States*, 276 U. S. 311; *United States v. Swift & Co., et al.*, 286 U. S. 106; 5. *In re Debs*, 158 U. S. 564, 583; *United States v. Elliott, et al.*, 62 Fed. 801, 64 Fed. 27, 29; 6. *United States v. Paramount Famous Lasky Corp., et al.*, 34 F. (2d) 984, 282 U. S. 30; *United States v. First National Pictures, Inc., et al.*, 34 F. (2d) 815, 282 U. S. 44; *United States v. West Coast Theatres, Inc., et al.*, (S. D. Cal., 1930, Eq. No. S-10-C); *United States v. Fox West Coast Theatres, et al.* (S. D. Cal., 1932, Eq. No. Y-38-H); *United States v. Balaban & Katz Corporation, et al.* (N. D. Ill., 1932 Eq. No. 8854); 7. *United States v. United Shoe Machinery Co., et al.*, 222 Fed. 349, 247 U. S. 32 (1918), 227 Fed. 507, 234 Fed. 127, 258 U. S. 451 (1922); 8. *Aluminum Co. of America v. Federal Trade Commission*, 284 Fed. 401 (C. C. A. 3, 1922); 299 Fed. 361 (C. C. A. 3, 1924). 9. See also *United States v. Atlantic Terra Cotta Company*; *United States v. American Terra Cotta Co. & Ceramic Co.* and *United States v. American Terra Cotta Co. & Ceramic Company* (Nos. 241, 242 and 256 in *The Federal Antitrust Laws Blue Book* of the Department of Justice, Gov. Printing Office, January, 1938).

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relate the defendants have rarely² made use of the *res judicata* doctrine to bar the subsequent litigation. It is only necessary to trace the juristic formulae that have been evolved to effectuate the purposes behind the doctrine of *re judicata* and its accompanying corollaries and then to superimpose these against the common governmental practices in antitrust litigation, and one will be impressed by the unusual fact disclosed by the record and will begin to speculate as to the reason why the defendants have not more frequently raised the *res judicata* doctrine in these cases.

We are concerned primarily with the application of the *res judicata* doctrine to conspiracy cases under Section 1 of the Sherman Act. However at the outset, it shall be our purpose to state the traditional doctrines of *res judicata* generally and then we shall present an argument to show that *the continuing nature of a conspiracy conditions and modifies the general doctrine of res judicata*. By way of introduction, certain general distinctions should be noted.

I. RES JUDICATA, STARE DECISIS, ESTOPPEL BY JUDGMENT, MERGER IN JUDGMENT, DOUBLE JEOPARDY AND COLLATERAL ATTACK DISTINGUISHED.

The doctrine of *res judicata* rests on the two maxims that "a man should not be twice vexed for the same cause" and that "it is for the public good that there be an end to litigation."³ The doctrine of "stare decisis" is not the equivalent of "*res judicata*," as it relates, not to the facts, but to the legal principles involved.⁴ The "right, question or fact" which when put in issue and determined to become the subject of the rule of *res judicata* must be a question of fact as distinguished from an abstract of law.⁵ *Res judicata* constitutes a plea in bar, founded on a specific judgment determinative of a specific contest, while *stare decisis* is not a plea but a rule of precedent.⁶ *Res judicata*

² The outstanding exception where the *res judicata* bar was raised is *Aluminum Company of America v. United States*, 302 U. S. 230; see also same case before Expediting Court, 20 Fed. Supp. 608.

³ Freeman on Judgments (5th ed.) Vol. 1, p. 1319; Fayerweather v. Rich, 195 U. S. 276.

⁴ In *re Rosier's Will*, 140 N. Y. Supp. 844, 846.

⁵ *State ex rel Kennedy v. Breatch*, 94 N. W. 1016, 68 Neb. 687.

⁶ *United States v. Certain Bottles* (D. C. Conn), 37 F. (2d) 137, 140.

binds parties and privies generally, while *stare decisis* governs the decision of the same question in the same way in an action between strangers to the record.⁷

The doctrine of estoppel is not *strictly applicable* to a judgment. A judgment is not the act of a party, an estoppel is. A judgment is a bar, not because a party has done some act which precludes him from asserting a right or title, it is properly a bar on principles of public policy, because the peace and order of society, the structure of our judicial system, and the principles of our government require that a matter once litigated should not again be drawn in question between the same parties or their privies.⁸ *Res judicata* and estoppel though kindred in nature are not identical, the former being of higher dignity than the latter.⁹ The doctrine of *res judicata* is based on the doctrine of estoppel as applied to court decisions and contemplates only such points as are actually involved and determined in a case and not what is said by a judge outside of the record or on points not necessarily involved therein and also includes (1) identity of the subject matter, (2) of the cause of action, (3) of the persons and parties to the action, and (4) of the quality in the persons for or against whom the claim is made.¹⁰ The four conditions outlined above seem to constitute the orthodox formula and the statement is made in many cases.¹¹

"Jeopardy" or "Double Jeopardy" in its constitutional and common law sense, has a strict application to *criminal* prosecution only.¹² The doctrine of "merger," that a cause of action when reduced to judgment has ceased to exist as an independent liability and is transmitted into the obligation created by the judgment operates only between parties and their privies, and does not affect strangers.¹³ *Res judicata* is broad enough to include "merger in judgment" and "estoppel by judgment" since both are grounded on fundamental precepts that it is for

⁷ *Marguerite Coal Co. v. Meadow River Lumber Co.*, 127 S. E. 644, 646, 98 W. Va. 698.

⁸ *Freeman on Judgments* (5th ed.), Vol. 1, p. 1318.

⁹ *Coffman v. Hope Natural Gas Co.*, 81 S. E. 575, 74 W. Va. 57.

¹⁰ *Atlantic Coast Line R. R. v. City of Lakeland*, 115 So. 669, 679; 94 Fla. 347.

¹¹ See Words and Phrases under "*Res Judicata*".

¹² *Rupert v. State*, 113 Pac. 713, 714 (Okla.), 45 L. R. A. (n. s.) 60.

¹³ *Frost v. Thompson*, 106 N. E. 1009, 1010; 219 Mass. 360.

the benefit of society that there be an end to litigation and that no litigant should be vexed twice over the same dispute.¹⁴

The doctrine of "collateral attack" denies any validity whatever to the former adjudication, while that of *res judicata* admits the entire validity and simply denies the scope claimed for it. There is little similarity between the two doctrines. Collateral attack involves the jurisdiction of the court and denies its power to act at all, while *res judicata* merely involves the question concerning what was actually decided in the trial. The doctrine of collateral attack has nothing to do with the issues or the matters contested on the trial.¹⁵

II. JUDGEMENT AS BAR DISTINGUISHED FROM ESTOPPEL AS TO PARTICULAR MATTER

Conflicting formulas, laid down in some cases are explained by the failure to notice that a former adjudication may be used *for two different purposes*; namely (1) either as a complete bar to the relitigation of the same cause of action, or (2) as a *conclusive evidence* of some fact or issue common to different causes of action.¹⁶ It is in the latter sense that the rule has been established that a decision upon any material point, which has in *fact been litigated and decided*, is conclusive, though the subject matter of the two suits is different.¹⁷

The leading authority making this distinction between the use of a former adjudication as an *absolute bar* to a second action and its use as a *conclusive* adjudication of some issue, fact or matter material to the determination of a second and different cause of action or claim is *Cromwell v. County of Sac*.^{17a} Mr. Justice Field formulated the distinction in the following words:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an

¹⁴ *Winters v. Basaillon*, 57 P. (2d) 1095, 1097, 153 Ore. 509.

¹⁵ *Van Fleet on Collateral Attack*, Sec. 17; *Bitzer v. Mercke*, 63 S. W. 771, 772, 111 Ky. 299.

¹⁶ *Freeman on Judgments* (5th ed.), secs. 671, 676.

¹⁷ *Russel v. Place*, 94 U. S. 606; *Davis v. Brown*, 94 U. S. 423.

^{17a} 94 U. S. 351.

absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (pp. 352, 353)

A leading case illustrating the estoppel as to a particular matter is *Southern Pacific R. R. v. U. S.*¹⁸ The court said:

"A question of fact or of law, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by a final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action."^{18a}

On the contrary, the best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. "The cause of action is the same when the evidence will support both actions; or rather the judgment in the former action will be a bar provided the evidence necessary to sustain the judgment for the plaintiff in the present action would have authorized a judgment for him in the former."¹⁹ Whatever be the form of the action, the issue is deemed the same whenever it may in both actions be supported by substantially the same same evidence.²⁰

III. IT IS NOT ONLY THE RIGHT BUT THE DUTY OF THE COURT FIRST ACQUIRING JURISDICTION OF THE CAUSE OF ACTION TO RESTRAIN FURTHER PROCEEDINGS INSTITUTED IN ANOTHER JURISDICTION TO RELITIGATE THE SAME QUESTIONS.

The right and the duty of the court first acquiring jurisdiction of the cause of action to restrain proceedings in another

¹⁸ 168 U. S. 1.

^{18a} See also *State of Oklahoma v. State of Texas*, 256 U. S. 831.

¹⁹ *Kiniry v. Davis*, 82 Okla. 211.

²⁰ 2 Freeman on Judgments, sec. 687 (5th ed.).

court to relitigate the same questions, is well established. It is predicated on two grounds (1) the duty to protect the jurisdiction over the subject matter entrusted to it and thereby prevent the possibility of a conflict of authority and (2) the duty of all courts to prevent parties litigant from being harassed by relitigation of matters once determined. This right and duty is inherent in a court of equity and is also authorized by statute. Sec. 262 of the Judicial Code authorizes United States courts "to issue all writs not specifically provide by statute, which may be necessary for the exercise of their respective jurisdiction."

In *Looney v. Eastern Texas R. R. Co.*,²¹ Mr. Justice Clark, speaking for the court said:

"The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long-established practice."

A comparable ruling was made in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pac. R. R. Co.*,²² wherein the power of a court of bankruptcy as a court of equity to protect its jurisdiction by injunction was sustained. In *Steelman, Trustee v. All Continent Corporation*,²³ Mr. Justice Cardozo said:

"This court has said that the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is . . . inherent in a court of bankruptcy, as it is in a duly established court of equity. (289). The trustee is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a res in his possession, actual or constructive, of the court that appointed him. . . . What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. . . . We are unable to yield assent to the statement of the court below that the restraint of a proper party is legally tantamount to the restraint of the court 'itself'. The reality of the distinction has illustration in a host of cases." (290-291).

In *Georgia Power Co. v. T.V.A.*,²⁴ the court said:

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid relitigation of questions once settled between the same parties is well settled, *Root v. Woolworth*, 150 U.S. 401, 411, 412."

²¹ 247 U. S. 214, 221 (1918).

²² 294 U. S. 648, 675, 676.

²³ 301 U. S. 278 (1937).

²⁴ 17 Fed. Supp. 769 (N. D. Ga. 1937).

This ruling was affirmed in 89 F. (2d) 218 (5th Cir. 1937), where the court said:

"Rarely has a conflict arisen between two federal courts in a civil case. With regard to conflicts between state and federal courts, which occur frequently, the rule is so well settled as to be considered elementary. *There is no logical reason why it should differ as to Federal Courts.* (221)."

The general governing principle is stated in 14 R.C.L. 470, as follows:

"The theory on which a court of equity acts in enjoining a proceeding in another court of coordinate jurisdiction is that it has *jurisdiction in personam*, and that so acting, it has power to require the defendant to do, or to refrain from doing, anything beyond the limits of its territorial jurisdiction, which it might require to be done or omitted within the limits of such territory. In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, *if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject matter of the first suit.* When an injunction is granted for this purpose, it is in no sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction."

The first court in the Kessler case,²⁵ discussed later, never had before it the defendant in the second suit and yet it issued an injunction. In the *Looney* and the *T.V.A.* case, *supra*, the first court had done no more than pass upon a preliminary injunction application, granting it in the *Looney* case and denying it in the *T.V.A.* case and yet injunctions were issued against prosecutions of the second suits.

IV. A COURT HAS THE RIGHT TO PROTECT ITS OWN PROCESS FROM ABUSE.

A leading text book writer on^{25a} the Sherman Act cites the case of *In re National Window Glass Workers*^{25b} as the only authority for the following proposition: "A conviction or an acquittal on an indictment for a continuing conspiracy bars another prosecution based on the same alleged conspiracy during a period subsequent to the return of the indictment on which the conviction or acquittal was had." Further, Point 9 in the syllabus of the case states the rule as follows: "A conviction or

²⁵ 206 U. S. 285

^{25a} Thornton, *Combinations in Restraint of Trade*, sec. 410a.

^{25b} 287 Fed. 219 (1922).

an acquittal on an indictment for continuing conspiracy bars another prosecution based on the same conspiracy, *but different overt acts*, during the period subsequent to the return of the indictment on which the conviction or acquittal was had." It is submitted that both the Thornton interpretation and the syllabus from the case are incorrect statements of what the case really held.

In this case the parties named in the caption filed in the United States District Court for the northern district of Ohio, eastern division on October 9, 1922 an application to quash, vacate and set aside certain subpoenas and subpoenas duces tecum duly served requiring them to appear and to give testimony and produce documents in a grand jury investigation about to be undertaken in this court. It appears that on March 17, 1922, a grand jury attending the United States District Court for the southern district of New York returned an indictment against these same defendants. A demurrer to the New York indictment was overruled in June 1922 and then a motion for a bill of particulars was granted on August 1, 1922. This bill was not served until September 16, 1922. The case was put on the calendar September 11, 1922, but a date for trial had not been fixed at the time when the motion to quash the subpoenas had been made in the Ohio District Court. The court held that where an indictment was already pending in another jurisdiction, subpoenas for witnesses to attend and produce documents at a grand jury investigation of the same charge, which was mainly for the purpose of enabling the government to procure testimony to be used in the trial of the other indictment, though it intended to ask for an indictment by that grand jury, on which, however, defendants would be tried only in the event the other indictment was dismissed for want of prosecution, *was an abuse of process*, so that such subpoenas will be vacated and set aside and the grand jury investigation restrained, until the government either has tried the defendants in the other district or stipulates for trial first on any indictment obtained from this grand jury. The court has a supervisory duty of seeing that its grand jury and its process are not abused or used for purposes of oppression and injustice. District Judge Westenhaver said, "May the government proceed from district to district in which overt acts have been com-

mitted in the furtherance of a continuing criminal conspiracy, and continuously and successively investigate the same transactions and indict the same persons? May counsel, parties and witnesses be called from their duty and obligation to prepare for trial on an indictment already returned, at the will and discretion of the government counsel? Is there any power or discretion in a District Court to prevent or set a limit to the oppression or injustice which may thus be inflicted? If any necessity or substantial reason for a new investigation is shown, the court undoubtedly would decline to interfere with a new investigation and the return of a new indictment. The only claimed justification for the present investigation is to get a new indictment, not for the purpose of immediate trial, but only for use in the event the New York prosecution should fail for want of jurisdiction. This claim seems to be without much substance. See *In re Palliser* 136 U. S. 257. *Benson v. Henkel* 198 U. S. 1, 15." (pp. 226-227)."

V. THE GENERAL RULE AS TO PERSONS BOUND BY A JUDGMENT AND THE EXCEPTIONS THERETO.

Freeman on Judgments²⁶ states the general rule as to persons bound by a judgment, in these words: "An adjudication takes effect only between those who are parties or privies to the judgment, and that it gives no rights to or against third parties."²⁷ But this general rule is subject to well recognized exceptions. Some of the more important of which are: (1) the "doctrine of representation" in which for convenience or practical necessity a judgment against a party may be conclusive on others, not actual parties, whom he is deemed to sufficiently represent because of the similarity of their interests.²⁸ "Class representation" is an illustration of this exception;²⁹ (2) another exception is where persons, though not nominal parties are the real parties in interest;³⁰ (3) where persons, not nominal parties actually participate in the litigation by actively and openly directing and controlling the same through persons who are parties;³¹ (4) or where the relation to

²⁶ (5th ed.), Vol. 1, sec. 407.

²⁷ *Kapelani's Estate v. Atcherly*, 238 U. S. 119.

²⁸ Freeman, secs. 409, 453, 437.

²⁹ *Ibid*, sec. 436.

³⁰ *Ibid*, sec. 430.

³¹ *Ibid*, sec. 432.

one of the parties is such that if he is given notice and an opportunity to defend he is bound by the result as against the party in whose behalf he was required to defend.³²

One of the leading cases which illustrates the principle that injunctions to prevent relitigation are not limited strictly by the doctrine of *res judicata* is *Kessler v. Eldred*.³³ Here Kessler, defendant in a patent infringement suit, had obtained a dismissal of the action. Subsequently the plaintiff, Eldred, sued certain of Kessler's customers, whereupon Kessler sought, but was refused in the lower court, an injunction against further prosecution of such suits. This ruling was reversed on appeal to the Supreme Court of the United States. The court held that Kessler was entitled to an injunction, stating:

"If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it." (289).

The court went on to say that it was unnecessary to determine whether the principle of *res judicata* was applicable inasmuch as the injunction was justified on the broader ground that the subject matter of both suits had been litigated in the first and that Kessler was by implication of the first judgment, fairly entitled to have his customers free from suit. The exclusion of the issue of *res judicata* was in these words (288):

"Whether the judgment between Kessler and Eldred is a bar to the suit of Eldred v. Breitwiesser . . . we deem it unnecessary to inquire. . . . It may be that the judgment in *Kessler v. Eldred* will not afford Breitwiesser, a customer of Kessler a defense to Eldred's suit against him. Upon that question we express no opinion."

The Kessler case thus shows that an injunction to protect the jurisdiction of the court is broader than the strict doctrine of *res judicata* would permit.

VI. JOINDER OF ADDITIONAL PARTIES IN THE SECOND SUIT
(WHICH IS IDENTICAL WITH THE FIRST) CANNOT HAVE
THE LEGAL EFFECT OF JUSTIFYING A PROCEEDING DE NOVO
AND IGNORING THE ORIGINAL JUDGMENT OR DECREE.

In *Thompson v. Roberts*,³⁴ the court said:

"The objection that the parties were not the same in both suits cannot be sustained. . . . No good reason can be given why the

³² *Ibid.*, secs. 447-450.

³³ 206 U. S. 285 (1907).

³⁴ 24 Howard 233, 241.

parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject matter were admitted by the practice of a court of chancery to assist on both sides."

The *Thompson* case was a suit at law on a promissory note and then a suit in equity to foreclose the mortgage accompanying the note. Fraud was the defense in both suits. The court said:

"The question between the present parties is *res judicata* and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason; making a distinction where there is no difference."

Freeman on Judgments³⁵ points out that it makes no difference whether the added parties are in the first or second suit; and further that jurisdiction will not be taken in equity to retry on the same facts a cause of action that has been decided in proceedings at law.³⁶

VII. THE FACT THAT ADDITIONAL RELIEF IS SOUGHT IN THE SECOND SUIT IN ANOTHER JURISDICTION CANNOT AVOID THE BINDING EFFECT OF THE FIRST DECREE.

Freeman on Judgments³⁷ states the doctrine as follows:

"If the claim or cause of action is substantially the same in both actions it is not material that the relief demanded is in some measure different. Thus the fact that only part of the relief sought in the first action is demanded in the second is immaterial. . . . And a cause of action is not varied by claiming additional damages."

In *Green v. Bogue*,³⁸ the court said:

"We do not deem the fact that a different form or measure of relief is now asked deprives the defendants in error of the protection of the prior findings and decrees in their favor."

In *Fidelity & Deposit Co. v. Gaston, Williams & Wigmore*,³⁹ the court said:

"The mere fact that the complainant changes his prayer for relief does not affect the decree in the former suit as a bar to this suit. See *Green v. Bogue*, 158 U.S. 478; in *re Samuels* (C.C.A.) 263 Fed. 561; *Coleman v. Apple* (C.C.A.) 298 Fed. 718."

³⁵ (5th ed.), vol. 1, sec. 417.

³⁶ *Ibid.*, vol. 2, sec. 644.

³⁷ Vol. 2, sec. 683.

³⁸ 158 U. S. 478.

³⁹ 13 F. (2d) 267, 268 (S. D. N. Y. 1926).

VIII. GENERAL PRINCIPLES OF RES JUDICATA RELATING TO THE CAUSE AND FORM OF ACTION

The doctrine of res judicata includes so many corollaries and implications, and these in turn are subject to so many exceptions, that for our purposes under this sub-heading we shall merely group in vacuo certain general principles in summary form.

DIFFERENCES IN FORM OF ACTION CANNOT DEFEAT DOCTRINE OF RES JUDICATA

Freeman on Judgments, states the rule:⁴⁰

"It is not material that the form of action be the same, if the merits were tried in the first case. A party cannot by varying the form of action or adopting a different method of presenting his case escape the operation of the principle that one and the same cause of action shall not be twice litigated. Where either of two remedies is equally available to vindicate the same right, the judgment in an action employing one of them will bar a resort to the other."

CAUSE OF ACTION INCLUDED ALL GROUNDS OF ACTION

Freeman on Judgments, states the rule as follows:⁴¹

"Where the parties and the gist of the action are the same, differences in the grounds of the action which do not change the substantial cause of action do not prevent the second judgment from operating as a bar. There is an obvious distinction between grounds of action and cause of action; a single cause of action may be based upon several grounds, in which event, whether actually litigated or not, they are all merged in the judgment which bars a new action on the same cause of action on a different ground. . . . But the general rule respecting grounds of action has no application to separate and independent causes of action which might but need not be joined in one action." (Union Central Life Insurance Co. v. Drake, 214 Fed. 536.)

THE DOCTRINE OF SPLITTING CAUSES

Van Fleet on "Former Adjudication," states the rule:⁴²

"The maxim that declares that no persons shall be twice vexed for one and the same cause prohibits a person from splitting a single cause into several and suing his adversary piecemeal. If he does so, the first adjudication will bar all the other suits."

WHAT ISSUE WAS LITIGATED?

Van Fleet on "Former Adjudication," states the rule:⁴³

⁴⁰ Vol. 2, secs. 648, 583, 611, 734, 737.

⁴¹ Vol. 2, sec. 681.

⁴² Vol. 1, sec. 59.

⁴³ Vol. 2, sec. 413.

"If the record shows the precise issue litigated there is no occasion to use parol or extrinsic evidence to prove what it was, and it cannot be done. But if the record, on account of its generality, fails to show what issue was on controversy, that fact may be proven by parol."

In *Russell v. Place*,⁴⁴ the Supreme Court of the United States held that,

"If it appears from the record that several distinct matters may have been litigated, upon one or more of which that judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

The plea of *res judicata* is *stricti juris* and must be established beyond question, and all doubts inure to the benefit of the of the party against whom it is pleaded.⁴⁵

NEW FACTS: IDENTITY OF CAUSES OF ACTION DOES NOT DEPEND UPON IDENTITY OF FACTS

In *Baltimore Steamship Co. v. Phillips*,⁴⁶ Mr. Justice Sutherland, speaking for the court, said:

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. The facts are merely the means and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*' *Chobanian v. Washburn Wire Co.*, 33 R.I. 289, 302." [Italics by Supreme Court.]

PART II

IX. THE CONTINUING NATURE OF A CONSPIRACY CONDITIONS THE DOCTRINE OF RES JUDICATA

The continuing nature of a conspiracy conditions the general doctrine of *res judicata*. This point will be developed from two points of view; (1) in the case of a regulatory injunc-

⁴⁴ 94 U. S. 606, 608.

⁴⁵ 1 Van Fleet on Former Adjudication, sec. 278.

⁴⁶ 274 U. S. 316, 321 (1927).

tion, applied to future changing business practices, the decree may be modified but the remedy must be sought generally in the form of supplemental relief in the first jurisdiction and not by a relitigation of the same issues in another court. (2) the later overt acts of a continuing conspiracy may so modify, contract or enlarge the pre-existing conspiracy that a new cause of action will arise and if this can be shown, a detour around the traditional doctrines of *res judicata* may be established. In developing this concept, the following types of cases will be considered; (A) The application of the Statute of Limitations under the Sherman Act (which *does not* require the averment or proof of an overt act as a condition of liability); (B) The application of the Statute of Limitations under Revised Statute sec. 5440 dealing with conspiracy "to commit any offense against the United States," which statute *does* require the averment and proof of an overt act; (C) The application of the "Immunity Statute" to a continuing conspiracy, and (D) The so-called "retroactive" application of the statute which penalizes a conspiracy, the formation of which antedates the statute. These cases demonstrate that the concept of a *continuing* offense has modified and conditioned many of the traditional doctrines associated with the interpretation of statutes of limitations, immunity statutes and the retroactive application of criminal statutes. There is no sound reason why the *continuing offense concept* should not also modify and condition the traditional doctrine of *res judicata*.

X. WHERE BECAUSE OF CHANGED CIRCUMSTANCES (NEW FACTS) IT IS ALLEGED THAT A DECREE SHOULD BE MODIFIED, THE REMEDY MUST BE SOUGHT IN THE FORM OF SUPPLEMENTAL RELIEF IN THE FIRST JURISDICTION AND NOT BY A RELITIGATION OF THE SAME ISSUES IN ANOTHER COURT

A fortiori must this be true of a cause of action under the Sherman Act culminating in a regulatory decree of an ever changing business, a decree characterized in *United States v. Swift & Co.*,⁴⁷ by Mr. Justice Cardozo as "A continuing decree of injunction directed to events to come. . . . The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious

⁴⁷ 286 U. S. 106, 114 (1932).

to change and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." If the first decree is not confined to then existing conditions, but was designedly drawn as a comprehensive and permanent regulation of the future then the proper manner to modify that first decree is to seek supplemental relief in the first jurisdiction. In the *Swift* case, *supra*, (at 114, 115) Mr. Justice Cardozo said:

"We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. The power is conceded by the government. . . . The result is all one whether the decree has been entered after litigation or by consent. . . . In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

In *United States v. American Can Co.*,⁴⁸ the court pointed out that if an injunction should prove ineffective, the Government could always reopen the proceeding and move for a dissolution saying:

"It is of course possible that these forecasts of the future may not be realized. In that event the retention of jurisdiction will enable the government promptly and cheaply to compel a dissolution whenever anything which defendant may hereafter do, or whenever anything which may hereafter happen makes such action necessary or expedient."

Illustrations of proceedings by supplemental petition in the court where jurisdiction was originally invoked are *United States v. Standard Oil Co. of N. J.*,⁴⁹ where in 1911 the Standard Oil Co. of N. J. and Vacuum Oil Co. were dissolved by decree in 1911 and when the two companies sought to merge nineteen years later, the government proceeded by supplemental petition in the court having original jurisdiction to enjoin the merger as a violation of the decree of 1911. Again when the government became dissatisfied with the efficacy of an antitrust decree obtained against the International Harvester Co. in 1918 as the result of a petition filed in 1912, it did not start a new proceeding, but in 1923, filed a supplemental petition in the old action praying that the original decree be reopened and amended to the end that the International Harvester Co. might be dissolved.⁵⁰ So when the large meat packers became dissatisfied

⁴⁸ 234 Fed. 1019 (D. Md. 1916).

⁴⁹ 47 F. (2d) 288 (1931).

⁵⁰ *United States v. International Harvester Co.*, 274 U. S. 693.

with the antitrust decree entered against them in 1920, they proceeded ten years later by a petition in the original action to seek a modification of that decree.⁵¹

XI. THE CONTINUING NATURE OF A CONSPIRACY HAS CONDITIONED THE APPLICATION OF THE STATUTE OF LIMITATIONS UNDER THE SHERMAN ACT (which does not require the averment or proof of an overt act as a condition of liability)

Despite the fact, as stated by Judge Carpenter,⁵² that "the Sherman Act is primarily a criminal statute," it was more than twenty years after the passage thereof before a case started by indictment reached the United States Supreme Court for review.⁵³ Mr. Justice Holmes pointed out in the *Kissel* case that "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is the result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

The *Kissel* case is one of the best reasoned decisions that analyzes the nature of a conspiracy. Mr. Justice Holmes said, "the defendants argue that a conspiracy is a completed crime as soon as formed, and that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded and a plea is proper to show that the *statute of limitations* has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also it is said, the fact that an unlawful contract contemplates future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime." (p. 607)

To which argument, Mr. Justice Holmes replies: "The

⁵¹ United States v. Swift & Co., 286 U. S. 106.

⁵² United States v. Swift, 188 Fed. 92.

⁵³ United States v. Kissel, 218 U. S. 601.

argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. *It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it.* It is also true of course, that the mere continuance of the result of a crime does not continue the crime. (*United States v. Irvine*, 98 U. S. 450). *But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one . . . If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success."* (p. 608)

One of the counts in the indictment to which the three year statute of limitations had been pleaded, alleged that on a certain date (six years prior to the indictment) "and from that date until the day of presenting the indictment" the defendants have been engaged in an unlawful conspiracy to restrain trade. Mr. Justice Holmes emphasized the narrow limits of the court's decision by concluding: "All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea."

The case of *Boyle v. United States*,⁵⁴ illustrates the rule as to the application of the statute of limitations to a "continuing conspiracy." This was a suit based on a conspiracy count under sec. 1 of the Sherman Act. The court said, "Nor was the government barred by the statute of limitations. The plaintiffs in error were not tried for entering into a written conspiracy of April 1st, 1911, but were convicted of the unlawful conspiracy to restrain trade which was a *continuing conspiracy* or combination, while the parties entering into such unlawful combination might have withdrawn from such combination and thereby relieved themselves from further liability and the

⁵⁴ 259 Fed. 801.

statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created."

The conspiracy rule under the Sherman Act as to the time of commission of the offense, that there is no need to aver and prove overt acts and the continuing nature of the offense is well stated in the case of *United States v. Cowell*.⁵⁵ District Judge Wolverton said, "In a case under this statute, it is unnecessary to set out any overt act. . . . But the combination is not a thing of the instant the minds of the agreeing parties have come to a complete understanding, either expressed or implied. The purpose thereof is an essential element as well, and this may contemplate that its operation shall extend over a period of time. While the parties are engaged in the operation of the design, or in carrying the same into effect, they are transgressing the statute, they are still agreeing to the unlawful offense, and still cohering in the thing that the law condemns. Thus the offense becomes a continuing one, and it is only necessary to allege that the parties were engaged in the unlawful combination or contract between specified dates. By such allegation, the offenders are apprised of the time of their transgression. (*United States v. Mac Andrews & Forbes* (C.C.) 149 Fed. 823.)"

XII. THE CONTINUING NATURE OF A CONSPIRACY HAS CONDITIONED THE APPLICATION OF THE STATUTE OF LIMITATIONS UNDER REVISED STATUTE SEC. 5440 DEALING WITH CONSPIRACY "TO COMMIT ANY OFFENSE AGAINST THE UNITED STATES" (which statute does require the averment and proof of an overt act)

In *Bannon v. United States*,⁵⁶ it was held that at common law it was neither necessary to aver or prove an overt act in furtherance of the conspiracy. In *United States v. Brittin*,⁵⁷ the court interpreted the basic United States statute (Sec. 5440 R. S.) dealing with conspiracy "to commit any offense against the United States." (It should be noted that there are no com-

⁵⁵ 243 Fed. 730.

⁵⁶ 156 U. S. 464.

⁵⁷ 108 U. S. 199.

mon law offenses against the United States.⁵⁸ In the *Bannon* and *Britton* cases the court said "that Sec. 5440 R. S. changes the common law only in requiring an overt act to be alleged and proved, thus affording a *locus poenitentiae*, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute."⁵⁹

In *United States v. Nash*,⁶⁰ which involved two conspiracy counts under the Sherman Act, the court said "The Sherman Act punishes the conspiracies at which it is aimed *on the common law footing*—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat. sec. 5440 in *Hyde v. United States*,^{60a} and *Brown v. Elliot*,^{60b} have no bearing on a statute that does not contain the requirements found in that section."

However two cases dealing with the application of the statute of limitations to actions brought under Revised Statutes sec. 5440, which are in the nature of continuing conspiracies, should be noted. In *United States v. Bradford*,⁶¹ the court said, "It is plain then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed, and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offense can be prosecuted, and the statute of limitations begins to run as regards that conspiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either secretly or publicly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy. It is well settled as I have already said, that the overt act need not itself be an offense. It might therefore be absolutely non-criminal per se, and being such, it could not attract the attention or arouse the suspicion of the government. That immunity from prosecution for the con-

⁵⁸ U. S. Hudson, 7 Cr. 32.

⁵⁹ See also *United States v. Britton*, 108 U. S. 193, 205.

⁶⁰ 229 U. S. 373, 378.

^{60a} 225 U. S. 347.

^{60b} 225 U. S. 392.

⁶¹ 148 Fed. 413 (C. C. E. D. La. 1905).

spiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy was thereafter continued or repeatedly renewed, and many other overt acts committed under it, is, to my mind, an utterly irrational conclusion which the law could never have contemplated. . . . It is inconceivable to me that the statute of limitations should begin to run before the government could prosecute." (417-418)

In *United States v. Greene*,⁶² the court held that a conspiracy to defraud the United States is punishable under Rev. Stats. 5440, notwithstanding the fact that the scheme to defraud was originally devised and entered into at a time so remote that prosecution for acts then done would be barred by limitation, when it was continuous in its operation, and overt acts have been committed thereunder within the period of limitation; and an indictment which after reciting the original scheme, charges a conspiracy at a later date to apply it, in pursuance of which overt acts were committed, is not objectionable on the ground of duplicity. The court said, a conspiracy "is not the case of an attempt to commit crime. The object of requiring proof of some act in furtherance of the unlawful agreement is to show that the unlawful combination became a living, active combination. (p. 352) . . ." The court cites the case of *People v. Mather*,^{62a} with approval of the following conspiracy doctrine: "The law considers, that wherever they act, there they *renew*, or perhaps to speak more properly, they *continue* their agreement, and this agreement is renewed or continued as to all whenever one of them does an act in furtherance of their common design."

XIII. THE CONTINUING NATURE OF A CONSPIRACY HAS CONDITIONED THE APPLICATION OF THE IMMUNITY STATUTE

One of the best reasoned cases on this point is *United States v. Swift*.⁶³ This was a criminal prosecution by the United States under the Sherman Act. In 1904, the defendants, acting under the protection of the Immunity Statute of February 11, 1893, testified before the Commissioner of Corporations. The court phrased the question before it in the following words:

⁶² 115 Fed. 343 (1902).

^{62a} 4 Wend. 229.

⁶³ 186 Fed. 1002 (1911).

“Assuming that the defendants informed the Commissioner in 1904 that they were conspiring or combining together in violation of the Sherman Act, was the immunity granted them by the statute, and by the judgment of this court, so perfect that they may continue indefinitely in their unlawful undertaking? . . . What I must decide is whether, granting that defendants were entitled to immunity from prosecution for any crime committed at the time they testified before the Commissioner, are they now immune, and will they forever be immune from prosecution for any acts concerning, or discovered by reason of, the matters, transactions and things about which they then testified?” (p. 1008, 1012) The court held that such immunity did not extend to a subsequent prosecution for continuing the same conspiracy thereafter, nor did it obliterate the facts testified to, which if legally competent and relevant, might be shown in the subsequent prosecution. The court said, “I cannot agree that the immunity act purposely was made attractive as a kind of bonus or bribe to induce innocent disclosures by the promise that a future crime concerning the acts, transactions and things testified about would pass unpunished. . . . The defendant’s position is that a general statement of one’s business made to the Commissioner of Corporations will prevent the government from using such information in any way for the purpose of ferreting out or prosecuting future crimes connected with that business. . . .” (p. 1016). It was further urged by the defendant that the legal effect of the immunity statute was the same as an amnesty or pardon, and that “the legal effect of the pardon or amnesty (the same thing) is to wholly obliterate the offense, and all of its consequences; to furnish a legal equivalent for conclusive proof that the pardoned acts never existed.” To this contention the court said, “Amnesty or pardon obliterates the offense, it is true, at least to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; *but it does not obliterate the acts themselves*. It puts the offender in the same position as though what he had done never had been unlawful; but it does not close the judicial eye to the fact that once he had done the acts which constituted the offense.” (pp. 1016-1017)

The case contains one of the best discussions of the legal implications of a continuing conspiracy. “The books say some-

times that each overt act 'renews' the conspiracy. This can be true only in the sense that the overt act constitutes renewed or further evidence of the continued existence of the conspiracy. A conspiracy is always required to support the overt act." (p. 1014) "The fact that conspiracies generally may be, and usually are, continuing agreements or understandings, emphatically is true of conspiracies to restrain or to monopolize commerce. . . . Restraint or monopolization of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it. The conspirators seek continuous restraint and monopolization." (p. 1015) "The argument of the defendants is that the crime of conspiracy is non-continuing, because the essential element of the offense is the act of confederating or plotting, which is in itself inherently a non-continuing act. The authorities are to the contrary." (p. 1015) "Suppose that in 1904 the defendants admitted to the Commissioner of Corporations that they had conspired to restrain the fresh meat trade in the country. Suppose that the confession was used to search out other evidence tending to show that the conspiracy organized in 1904 had been in continuous operation up to and including the month of September 1910. Can they stand boldly upon the proposition that with respect to these matters, transactions and things which they had confessed they are immune for all time to come? Not only immune from punishment concerning the things of the past which they disclosed, but immune from punishment for continuing in their unlawful engagement? Not only that, but immune from the use of the evidence against them for any purpose at any time thereafter? Immunity does not mean license. If it does, then one need only to confess his crime, and his license to violate the law becomes perpetual." (p. 1016)

XIV. THE CONTINUING NATURE OF A CONSPIRACY HAS CONDITIONED THE SO-CALLED "RETROACTIVE" APPLICATION OF THE STATUTE WHICH PENALIZES A CONSPIRACY, THE FORMATION OF WHICH ANTEDATES THE STATUTE

The original agreement or conspiracy often antedates the passing of the statute, the purpose of which is to outlaw it. In such a situation, the defendant attempts to establish the proposition that the statute is being given a retroactive application.

Two leading cases, wherein this contention has been overruled are *Trans-Missouri Traffic Assn. v. United States*,⁶⁴ and *Waters-Pierce Oil Co. v. Texas*.⁶⁵ In the *Trans-Missouri* case, an action under the Sherman Act, the defendants contended "that to grant the injunction prayed for in this case is to give the statute a retroactive effect. That the contract at the time it was entered into is not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper." The court said, "We give to the law no retroactive effect. *The agreement in question is a continuing one.* . . . Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it had been declared to be illegal, becomes a violation of the Act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the Act."

In the *Waters-Pierce* case, a proceeding under the Texas Antitrust law, the court said to the argument that the statute was being given a retroactive effect, "This argument is predicated largely upon the contention that the conviction in this case was because of the old agreement. . . . made long before the passage of the present statute at a time when it was legal. . . . There was ground for conviction not because of the making of the old agreement . . . but because the new company was found to have carried out the old agreement after the passage of the law had brought itself within its terms." (107-108)

XV. RECAPITULATION—THE LEGAL IMPLICATIONS TO BE DRAWN FROM THE CONCEPT OF CONSPIRACY AS A CONTINUING OFFENSE AND THEIR EFFECT ON THE TRADITIONAL DOCTRINE OF RES JUDICATA.

The authorities cited dealing with (a) the statute of limitations; (b) the immunity statute and (c) with the contention that a retroactive application of the conspiracy statute had been made, are introduced as indirect evidence to clarify the legal implications to be drawn from the concept of conspiracy as a

⁶⁴ 166 U. S. 290.

⁶⁵ 212 U. S. 86.

continuing offense. These cases demonstrate that the concept of a continuing offense has modified and conditioned many of the traditional doctrines associated with the interpretations of statutes of limitations, immunity statutes and the retroactive application of criminal statutes. There is no sound reason why the continuing offense concept should not also modify and condition the traditional doctrine of *res judicata*.

Inherent in the continuing offense concept is the idea that the government in a suit seeking to prevent the further continuance of a conspiracy in restraint of trade and in the monopolization thereof must have the right to state the *whole conspiracy*, although what it is directly seeking is to enjoin or penalize its present stage. There may be an almost infinite variety of steps taken which constitute the conspiracy and later developments may alter the legal picture which was passed upon in an earlier decision between the same parties. It is imperative that the government should not be hamstrung in presenting the effect of the prior stages to assist the court in drawing its conclusions as to the legality of the latest steps and their relation to the whole conspiracy which is a continuing thing.

XVI. POSSIBLE DETOURS AROUND THE RES JUDICATA DOCTRINE.

(A) A "New" Conspiracy

It is our thesis that the later overt acts of a continuing conspiracy may so modify, contract or enlarge the pre-existing conspiracy, that in contemplation of law a new conspiracy is born, and if this can be shown, a detour around the traditional doctrines of *res judicata* may be established. The idea of conspiracy as a continuing offense, under which each subsequent overt act not only renews but also may modify *in fact* the basic conspiracy, presents squarely the query whether *in law* a continuing offense necessarily and inherently implies that it is limited to a mere prolongation of the "same offense," which is a basic concept in the doctrine of *res judicata*.

A basic minimum on which all courts are in agreement is that prosecutions are for the *same offense* when they are for violations of the same provision of the criminal law and when the facts on which they are based are the same.⁶⁶ Various tests

⁶⁶ See *Commentaries on The Administration of the Criminal Law*, American Law Institute, Official Draft 1935, p. 9.

for the determination of whether two acts constitute the "same offense" have been established. In 1796 the English courts stated a test for determining when two offenses *are not* the same offense. This was known as the test in *Vandercomb's* case⁶⁷ and was stated as follows:

"Unless the first indictment was such as the prisoner might have been convicted upon by a proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

Later courts in order to determine the "same offense" used the converse of the rule in the *Vandercomb* case and stated it to be that "if the facts sufficient to support the second indictment would have warranted a conviction on the first indictment, the two offenses *are* the same."

In stating the converse of the rule, some courts appear to have confused "would have warranted a conviction on the first indictment"⁶⁸ with "would have warranted a conviction of the offense charged in the first indictment." The latter phraseology has been attacked on the ground that it fails to encompass the uniformity of certain conclusions that a charge of murder is a bar to a prosecution for assault and battery, since under the latter language if a defendant is first charged with murder and acquitted, a latter prosecution for assault and battery is not barred since the facts necessary to prove assault and battery would not secure a conviction for murder.⁶⁹

But some courts state that "This general rule (i.e. the *negative* rule of the *Vandercomb* case) is, however, subject to this exception: When after the first prosecution a *new fact supervenes*, for which the defendant is responsible, which changes the character of the offense, and together with the facts existing at the time constitutes a *new and distinct* crime, an acquittal or conviction of the first offense is not a bar to an indictment for the second."⁷⁰

Another formulation of the contention here advanced is stated as follows: "An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time, and as to conditions then existing, and cannot

⁶⁷ 2 Leach C. C. 708, 720.

⁶⁸ *People v. Nelson*, 71 Cal. App. 476, 479 (1924).

⁶⁹ See *Commentaries on the Administration of the Criminal Law*, Official Draft 1935, at p. 27.

⁷⁰ *State v. Littlefield*, 70 Mo. 452, 456 (1880).

operate as an estoppel to another action or proceeding, which though involving the same rights passed upon, is yet predicated upon facts that have arisen subsequent to the former adjudication.⁷¹ A judgment being conclusive only upon matters within the issues, is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered.⁷²

(B) MONOPOLY AND COMBINATION (CONSPIRACY) ARE LEGALLY DISTINCT OFFENSES.

A second detour around the *res judicata* doctrine grows out of the situations wherein in the first trial the charge is monopoly and in the second is combination, albeit the identical facts are relied on in each trial.

In the two cases of *United States v. McAndrews & Forbes Co.*,⁷³ the defendants were indicated under Section 172 of the Sherman Act on three counts, the first charging a combination, and the second a conspiracy in restraint of interstate trade and commerce, while the third asserted an attempt to monopolize a portion of the same. All three counts are based upon the same allegations of fact, and in effect assert that the same doings, facts and circumstances constitute at once a combination, conspiracy and monopoly. The indictment having come on for trial resulted in a verdict of guilty against the corporate defendants upon the first and third counts only, i.e. for combination and monopoly under the Sherman Act. It is urged by the defendants that the charges of combination and monopoly constitute but one offense, and that therefore either (1) the verdict is void and judgment thereon is unlawful, or (2) that no punishment can be awarded upon more than one count, as to impose a fine under both counts would amount to a double punishment for the same offense. Judge Hough said, "The true test of the correctness of the defendant's position is whether upon a review of both the facts and the law identity exists between the offenses proved in this case and called in the first combination and in the third monopoly. If identity does exist, a conviction under either count would be a bar to a prosecution on the other, and therefore a bar to punishment on both. The rule regarding identity of offenses is to discover whether the

⁷¹ 24 Amer. & Eng. Encyc. of Law 777.

⁷² 2 Black on Judgments, sec. 617.

⁷³ 149 Fed. 825, 836.

crimes under consideration are in substance precisely the same, or of the same nature or species, or that one crime is an ingredient of the other.”

“In this case the crimes of monopoly and combination are legally distinct. The offense under the first count was complete when the combination was actually formed with the intent to bring about restraint of interstate commerce. The additional overt acts were *but cumulative evidence* from which the true intent, purpose and continuation of the combination might be inferred. *But they were themselves the proof of the monopoly*, and the monopoly consisted in their aggregate effect. That the prosecution in overwhelmingly proving the existence and intent, and continuance of the combination proved the monopoly does not in my opinion render the offenses identical, merely because all the evidence offered was in a sense applicable to both counts. How slight the difference may be to deprive the plea of former jeopardy or autrefois convict of validity the cases clearly show” (pp. 837-838).

(C) CIVIL SUIT UNDER SHERMAN ACT DOES NOT BAR CRIMINAL ACTION OR VICE VERSA.

A third detour around the doctrines of *res judicata* is that a civil suit will not bar a criminal prosecution or vice versa. The Sherman Act provides for both civil and criminal proceedings by the government. Further, the pendency of a criminal case against the defendants is no reason for postponing the suit in equity against such defendants concerning the same offense charged in the indictment. The court will not wait, unless in an exceptional case, the determination of the criminal case.⁷⁴ Further, the statute especially authorizes the court to entertain proceedings in equity at the instance of the government, to prevent and restrain violations of its provisions. This settles the question of the jurisdiction of a court of equity to prevent by injunction the commission of a crime. The fact that the government does not have a pecuniary interest in the suit is not sufficient to defeat it.⁷⁵

⁷⁴United States v. Standard Mfg. Co., 191 Fed. 172, *aff'd* 226 U. S. 20.

⁷⁵United States v. Elliott, 64 Fed. 27; United States v. Debs, 64 Fed. 724.

The rule as to the effect of judgments in criminal cases as evidence in civil cases is stated by Freeman as follows:⁷⁶

"The record of a conviction or of an acquittal is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action nor ordinarily is it even evidence of such facts. The chief reason for excluding the record of a criminal prosecution from evidence in a civil case is that the parties to the two proceedings are different. One who has been damaged by some criminal act of another has a claim for remuneration independent of the right of the government to proceed against the offender, and to inflict the penalty prescribed by law. While the difference in parties and lack of mutuality are a logical and sufficient reason in most cases for this general rule, other reasons given are the different rules of evidence and procedure which prevail in civil and criminal cases and the differing degrees of proof required. *But the only real occasion or necessity for resorting to the latter class of reasons is in those cases where the parties are the same.*"

The latter reason would be the appropriate one under the Sherman Act for the government can bring against the same parties either a criminal or civil action under the law. The earlier doctrine that civil remedies were merged in the higher offense (the criminal one) and could not be pursued until after the trial and conviction of the offender is now obsolete.⁷⁷

(D) ANOTHER DETOUR GROWS OUT OF THE DOCTRINE THAT
NO QUESTION BECOMES RES JUDICATA UNTIL IT IS
SETTLED BY A FINAL JUDGMENT ON THE MERITS.

In *Berman v. United States*,⁷⁸ Mr. Chief Justice Hughes, speaking for a unanimous court said, "In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I.M. & S. R.R. v. Southern Express Co.*, 108 U.S. 24, 28; *United States v. Pile*, 130 U.S. 280, 283; *Heike v. United States*, 217 U.S. 423, 429. Where two actions involving the same issue or issues, between the same parties or their privies, are pending at the same time, so that a final judgment in one would be res judicata or a bar in the other, when the judgment becomes final it may be urged in the other by appropriate proceedings, regardless of which action was begun first.⁷⁹ It is the first final judgment, although it may be in the second

⁷⁶ Freeman on Judgments, vol. 2, secs. 653-654.

⁷⁷ *Ibid.*, vol. 2, sec. 559.

⁷⁸ 302 U. S. 211, 212, 213 (1937).

⁷⁹ *Hart Electric Co. v. Railroad Supply Co.*, 244 U. S. 294.

suit, that renders the matter *res judicata* in the other suit.⁸⁰ In *Webb v. Buckley*⁸¹ the court said, "It is only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue. An interlocutory order is not such a judgment. It is not a judgment at all."

A well known classification of judgments⁸² *not on the merits* is stated as follows: (1) where the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief; (2) where he has misconceived his action; (3) where he has not brought the proper parties before the court; (4) where the decision was on demurrer, and the complaint in the second suit sets forth the cause of action in the proper form; (5) where the first suit was prematurely brought and (6) where the matter in the first suit is ruled out as inadmissible under the pleadings.

Two of the common devices used in antitrust litigation are the plea of *nolo contendere* and the consent decree. Under the above rule relating to "finality" and "merits" the courts have held that a plea of *nolo contendere* does not create an estoppel but is an admission of guilt for the purposes of the case only.⁸³ It cannot be used against the defendant as an admission in any civil suit for the same act.⁸⁴ For the purposes of the case only it is equivalent to a plea of guilty, but is distinguishable from such plea in that it cannot be used as an admission in any civil suit for the same act.⁸⁵ On the contrary, a judgment entered upon confession without action is as conclusive as any other final judgment, and it is equally protected against collateral

⁸⁰ *McDougal v. Black Panther Oil & Gas Co.*, 273 Fed. 113.

⁸¹ 82 N. Y. 555.

⁸² *Smith's Leading Cases*, Case 673; see also *Freeman on Judgments*, vol. 2, sec. 732.

⁸³ *Hudson v. United States*, 272 U. S. 451; see *Hadlick's Criminal Prosecutions under the Sherman Antitrust Act*, Chapter IX; also *Twin Ports Oil Co. v. Pure Oil Co.*, 26 Fed. Supp. 366.

⁸⁴ *Fidelity-Phoenix Ins. Co. v. Murphy*, 166 So. 604, 609; 231 Ala. 680.

⁸⁵ *Tucker v. United States*, 196 Fed. 260, 262, 266, 267.

attack or impeachment; and like a judgment rendered after a contest on the merits, it operates as a merger of the cause of action, and while it remains in force, the plaintiff cannot maintain an action for the same claim or demand.⁸⁶

(E) THE "SWEEPING TERMS" OR THE "GENERAL LANGUAGE" of the FORMER DECREE DO NOT OF THEMSELVES DETERMINE THE GIST OF THE PRIOR ACTION OR SERVE AS THE SOLE TEST OF WHETHER THERE IS AN IDENTITY OF CAUSES OF ACTION.

As a device for limiting the application of the doctrine of *res judicata*, a proper interpretation of the former decree is important. The courts in antitrust cases, because of the brevity and vagueness of the statute, are often tempted to issue injunctions in broad and general terms which often amount to a mere prohibition against violation of the law. This practice was condemned by Mr. Justice Holmes in *Swift v. United States*⁸⁷ in these words: "We equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law." In accordance with this warning, the court held that the general words of the injunction, "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" should be stricken out. (at p. 401.) But in spite of the warning, the practice continues.

As an additional detour around the *res judicata* doctrine, a proper interpretation of the sweeping character of the former decree will be found useful in many cases. Two leading cases decided by the Supreme Court of the United States state the proper canon of construction in interpreting a former decree. In *Vicksburg v. Vicksburg Water Co.*⁸⁸ the court said, "A decree must be read in the *light of the issues involved in the pleadings* and the *relief sought*, and we are of the opinion that the matters now litigated were not involved in or disposed of in the former case, and that, when properly construed, the decree does not finally dispose of the right of the city to regulate rates under a law passed after the contract went into effect, and long after

⁸⁶ Black on Judgments, sec. 698.

⁸⁷ 196 U. S. 375, 396.

⁸⁸ 206 U. S. 496, 508 (1907).

the bill was filed in the case.” Later in *Vicksburg v. Henson*⁸⁹ the court said, “The nature and extent of the former decree is not to be determined by *seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and what the decree was really designed to accomplish.* We cannot agree with the court below or with the majority of the circuit court of appeals, that the effect of the former adjudication was to preclude the rights of the parties in the present controversy.”

⁸⁹ 231 U. S. 259, 273 (1913); see also *Nerney v. N. Y. N. H. & H. R. R. Co.*, 83 F. (2d) 409, 411 (C. C. A. 2., 1936), and *N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 404 (1905).